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ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COM. E. C. C. DIVISION
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Commonwealth Edison Company)
)
Verified Emergency Petition for a Declaratory)
Ruling determining Commonwealth Edison)
Company's obligations under the provisions of)
Article IX of the Public Utilities Act, including)
220 ILCS 5/9-102, 103, 104, 201, 240, and 241,)
to pay under ComEd's Rider 3-Qualified Solid) Case No. 02-0455
Waste Energy Facility Purchases to Resource)
Technology Corporation for purchases of)
energy from Resource Technology)
Corporation's facility located at 14732 East)
2100 North Road, Pontiac, Illinois in quantities)
that are in excess of that facility's 10 MW)
configured capacity specified in the)
Commission's Order in Docket 97-0034 dated)
October 8, 1997 or for other relief)

CHIEF CLERK'S OFFICE

BRIEF ON EXCEPTIONS
BY BANCO PANAMERICANO, INC.,
CHIPLEASE, INC. AND LEON GREENBLATT

Intervenors Banco Panamericano, Inc., a South Dakota corporation authorized to conduct business in Illinois, with its principal place of business located in Chicago, Illinois, Chiplease, Inc., also a South Dakota corporation authorized to conduct business in Illinois, with its principal place of business located in Chicago, Illinois, and Leon Greenblatt, an Illinois resident, (collectively referred to as "Banco"), by their attorneys, pursuant to 83 Ill. Adm. Code 200.830, 840 *et seq.*, submit the following Exceptions to the Proposed Order of the Illinois Commerce Commission ("Commission") dated July 29, 2002 and, as part thereof, incorporate the following Substitute Language relating to the evidence presented in connection with this proceeding:

EXCEPTION 1

The Proposed Order finds that the prior designation of Resource Technology Corporation ("RTC") as a qualified solid waste energy facility ("QSWEF") imposed a limit on the maximum

amount of megawatts (“MW”) of electricity for RTC’s Pontiac facility at 10 MW. (Proposed Order, pp. 11, 12.) This finding is contrary to the record and is factually incorrect.

By Order dated October 8, 1997 (the “Order”), the Commission granted RTC status as a QSWEF, finding that RTC satisfied the elements of Section 8-403.1 of the Public Utilities Act. (A copy of the Order is attached as Ex. A to RTC’s Response to Verified Emergency Petition For Declaratory Ruling And Staff Response (“RTC’s Response”), that was previously filed in this proceeding.) A review of the record confirms that, in the context of determining whether RTC qualified as a QSWEF in the first place, the Commission considered the approximate MWs that RTC anticipated, at that time, would be produced by all of its facilities combined. The amount of anticipated MW output for the Pontiac facility, at that time, was 10 MW. (Order, p. 6.)¹ The Commission then used the aggregate figure upon which to base, in part, its finding that RTC was “primarily engaged in producing” the qualified energy. (Order, p. 8.)

That was the extent to which the aggregate number of anticipated MW outage was used, or could have been used. Indeed, the record demonstrates that the 65 MW figure was merely an estimate. (RTC Motion, Ex. E, pp. 68-69.) While the ALJ seeks to bolster his finding of a 10 MW limit for the Pontiac facility on the testimony of the RTC witness (Proposed Order, p. 11), that witness merely testified that as to the approximate wattage output for all of RTC’s facilities combined.

In the findings of fact contained in the Order, the Commission merely found that the “evidence indicates that the electric generating facilities will be configured to have a maximum gross generating capacity of approximately 65 MWs . . .” (Order, p. 10, ¶ 4) (emphasis supplied). Again, the Commission made this finding purely as support for its additional finding

¹ This figure was contained in the “Summary of Evidence” finding in the Order and, as set forth below, was merely the anticipated wattage output at the time.

that "RTC is primarily engaged in the business of producing electricity from QSWEFs." (Order, p. 10, ¶ 6) Nowhere in the Order did the Commission expressly prohibit the RTC facilities from producing electricity generated from landfill methane gas in excess of 65 MW.

Furthermore, even if it could be deemed that the Commission imposed such a limitation, that limitation unquestionably was based on the aggregate amount of MW output from all of RTC's combined facilities and not specific MW levels for each facility individually.²

Substitute Language

The Commission's prior designation of RTC as a QSWEF did not impose a 10 MW limit for the amount of electricity generated from landfill methane gas by the Pontiac facility. Rather, the 10 MW output was merely the approximate amount estimated by the RTC for the Pontiac facility at that time. Further, this level of output was merely considered along with the approximate levels of anticipated wattage for RTC's other facilities, in the aggregate, for determining whether RTC was "primarily engaged in producing" qualified energy for QSWEF status under Section 8-403.1 of the Public Utilities Act. Accordingly, ComEd is obligated to pay Rider 3 rates for all of the energy it purchases from RTC's Pontiac facility.

² The ALJ suggests that the claim there was no 10 MW limit imposed by the Order "might have some merit if the actual capacity of the Pontiac facility was close to 10 MW." (Proposed Order, p. 11.) This contention, however, makes no sense. The issue is whether the Commission imposed a maximum wattage limit for the Pontiac facility in the Order and, if so, whether Commonwealth Edison Company ("ComEd") must pay Rider 3 rates for MWs in excess of that amount, not whether RTC exceeded that limit by some arbitrary and undefined amount. If there truly were such a limit, then it should be irrelevant by how much RTC exceeded the limit. The suggestion that RTC's position would have more merit if it was merely a "little bit" over the limit demonstrates that there in fact was no maximum limit at all.

EXCEPTION 2

The Proposed Order finds that the Commission possess the authority to set wattage limits on individual QSWEFs such as the Pontiac facility. (Proposed Order, p. 11.) This finding is erroneous as a matter of law.

The “Commission is a creature of the legislature deriving its power and authority solely from the statute creating it, and its acts or orders which are beyond the purview of the statute are void.” *Illinois Bell Telephone Co. v. the Illinois Commerce Commission*, 203 Ill. App. 3d 424, 438, 561 N.E.2d 426, 436 (2nd Dist. 1990). Any authority or power claimed by the Commission “must arise from the express language of the statute under which it acts or, by fair implication and intendment, be incident to the express authority conferred by the legislature.” *Abatron, Inc. v. Department of Labor*, 162 Ill. App. 3d 697, 700, 515 N.E.2d 1336, 1338 (2nd Dist. 1987). *See also, Schalz v. McHenry County Sheriff’s Dept. Merit Comm.*, 113 Ill.2d 198, 202-03, 497 N.E.2d 731, 733 (1986) (claimed authority must arise from language of statute).

Here, the Public Utilities Act defines a QSWEF as “a facility determined by the [Commission] as such under the Local Solid Waste disposal Act, to use methane gas generated from landfills as its primary fuel, and to possesses characteristics that would enable it to qualify as a . . . small power production facility under federal law.” 220 ILCS 5/8-403.1. If these requirements are met, an energy producer is entitled to QSWEF status. If the QSWEF facility thereafter satisfies all of the reporting and other requirements imposed by the statute, it is entitled to retain its QSWEF status. Nothing in the Act’s language imposes any limitation or cap on the amount of wattage that can be generated by a QSWEF, nor does the Illinois regulatory definition of such a facility. 83 Ill. Adm. Code 445.20 (defining a QSWEF as “a facility that meets the criteria set forth in 18 CFR 292 . . . and the Local Solid Waste Disposal Act . . . or an electric

generating facility which uses methane gas generated from landfills and meets such requirements of 18 CFR 292.”)³

Nothing in the Act’s language expressly grants the Commission authority to set wattage limits in either conferring QSWEF status for an entity or establishing procedures that the facility must meet in order to retain QSWEF status. While the Act authorizes the Commission to “design and implement policies which encourage . . . small power production” (220 ILCS 5/8-403), there is no language that confers the express authority to set wattage limits. Had the legislature intended for the Commission to possess that authority, it could have easily included language to that effect. The legislature’s silence speaks volumes.

In fact, if the Commission was able somehow impose a wattage limit, then the Pontiac facility would actually be divided into a QSWEF facility for up to 10 MW of electricity that it generated, but a non-QSWEF facility for wattage in excess of 10 MW. There is absolutely no provision in the Act that authorizes splitting a facility in this manner. Indeed, the Act is designed to encourage facilities to expend great sums of money to be able to generate electricity from landfill methane gas. Section 8-403.1 of the Act specifically mandates that ComEd enter into long term contracts for the purchase of this electricity, an acknowledgement of the significant start up costs necessary to secure QSWEF compliance. If facilities knew that, having incurred these costs, they might not achieve full QSWEF status, they will be less likely to make that investment in the first place.

The “primary rule of statutory construction is to determine and give effect to the intent of the legislature, and the language of the statute is the best indication of that intent.” *First Bank of*

³ The Federal regulations for “qualifying small power production facilities” impose a “power production capacity” limitation of “80 [MW] per facility,” which the RTC indicates is far more than it would ever produce at the Pontiac facility. 18 CFR 292.204(a).

Roscoe v. Rinaldi, 262 Ill. App. 3d 179, 184, 634 N.E.2d 1204, 1208-09 (2nd Dist. 1994). “The fact that no statute precludes an agency from taking a particular action does not mean that the authority to do so has been given by the legislature.” *Illinois Bell*, 203 Ill. App. 3d at 438, 561 N.E.2d at 436. “As a matter of statutory construction, the expression of one thing in an enactment excludes any other, even if there are no negative words prohibiting it.” *Id.*; *See also*, *Abatron*, 162 Ill. App. 3d at 701, 515 N.E.2d at 1339 (same). Indeed, “[h]ad the legislature intended that the [agency] have the authority asserted . . . the legislature could have easily provided” for such. *Id.*

The Public Utilities Act clearly declares that “[i]t is . . . to be the policy of this State to encourage the development of alternate energy production facilities in order to conserve our energy resources and to provide for their efficient use.” 220 ILCS 5/8-403(a). There is no expression of any intent to impose wattage limitations. Indeed, that would be contrary to the policy of creating non-traditional power sources to protect the public’s resources and to promote a “green environment” in the first place. In short, the Commission does not possess the authority to set any wattage limits, particularly as it relates to any one facility such as the Pontiac Facility.⁴

Substitute Language

The Commission is a creature of the legislature deriving its power and authority solely from the statute creating it, and its acts or orders that are beyond the purview of the statute are void. Any authority or power claimed by the Commission must arise from the express language

⁴ To the extent that the Order imposes an aggregate wattage limitation of 65 MW for all of RTC’s facilities combined, the Intervenor’s do not challenge that prior Order, as RTC’s present aggregate wattage output is far below that limitation. Further, the Intervenor’s note that RTC has filed a Verified Emergency Petition For Determination Of Continued QSWEF Status In Light Of A Change In Generating Capacity, in matter number 02-0461, in which it seeks a declaration that the Pontiac facility’s current generation of 35 MW does not affect its eligibility for QSWEF status in Illinois.

of the statute under which it acts or, by fair implication and intendment, be incident to the express authority conferred by the legislature.

The Public Utilities Act clearly declares that “[i]t is . . . to be the policy of this State to encourage the development of alternate energy production facilities in order to conserve our energy resources and to provide for their efficient use.” 220 ILCS 5/8-403(a). There is no expression of any intent to impose wattage limitations. Likewise, there is no wattage limitation in Illinois’ regulatory definition of such a facility. 83 Ill. Adm. Code 445.20.

Under the Act, a QSWEF is “a facility determined by the [Commission] as such under the Local Solid Waste disposal Act, to use methane gas generated from landfills as its primary fuel, and to possesses characteristics that would enable it to qualify as a . . . small power production facility under federal law.” 220 ILCS 5/8-403.1. If these requirements are met, an energy producer is entitled to QSWEF status. If the QSWEF facility thereafter satisfies all of the reporting and other requirements imposed by the statute, it is entitled to retain its QSWEF status.

Had the legislature intended for the Commission to possess the authority to set wattage limits, it could have included that express language in the Act. Because it did not, and because such authority is not incident to the Commission’s powers and cannot otherwise be implied from the Act, the Commission does not possess the authority to set wattage limits for the Pontiac facility. Accordingly, ComEd is obligated to pay Rider 3 rates for all of the energy it purchases from RTC’s Pontiac facility.

EXCEPTION 3

In approving ComEd’s request for a declaratory judgment that it need not pay Rider 3 rates for energy generated by the Pontiac facility in excess of 10 MW, the Proposed Order acknowledges ComEd’s position that in 2002, RTC’s Pontiac facility “began to produce energy

in excess of its maximum 10 MW configured capacity under the Order” (Proposed Order, p. 3) as well as ComEd’s claim that its interconnection with RTC is irrelevant. (Proposed Order, pp. 7-8.) The Proposed Order also notes the Commission Staff’s support of ComEd’s claim that it need not pay Rider 3 rates for energy generated by the Pontiac facility in excess of 10 MW. (Proposed Order, p. 10.) Both ComEd and the Commission, however, were not only fully aware of, but encouraged, RTC’s plans to produce more than 10 MW of electricity from landfill methane gas. Accordingly, ComEd and the Commission should now be estopped from contending that ComEd need not pay Rider 3 rates for electricity in excess of 10 MW.

Equitable estoppel arises through a party’s conduct whereby “he is precluded from asserting his against another who in good faith relied on such conduct and was thereby led to change his position to his detriment.” *Searcy v. Chicago Transit Authority*, 146 Ill. App. 3d 779, 783, 497 N.E.2d 410, 413 (1st Dist. 1986). *See also, Northern Trust Co. v. Oxford speaker Co.*, 109 Ill. App. 3d 433, 439, 440 N.E.2d 986, 973 (1st Dist. 1982) (same). A fraudulent intent is not necessary for estoppel. *Northern Trust Co.*, 109 Ill. App. 3d at 439, 440 N.E.2d at 973. The doctrine of equitable estoppel has been applied against local government entities. *Searcy*, 146 Ill. App. 3d at 783, 497 N.E.2d at 413.

Here, as recently as last fall, RTC sought permission to further expand its energy generating capabilities at the Pontiac facility. On November 27, 2001, it filed a Notice of Motion and Motion To Authorized Debtor To Barrow Funds From Network Electric Company, Grant Liens, And For Other Relief in the pending bankruptcy proceeding. That motion, a copy of which is attached as Ex. A, was served on the Commission. (Ex. A, p. 3).

In the motion, RTC explained that it intended “to expand its capabilities at the Pontiac Facility.” (Ex. A, ¶ 7.) RTC also indicated that it had recently reached an agreement with NEC,

subject to the bankruptcy court's approval, to borrow approximately \$34,000,000.00 for this expansion project. (Ex. A, ¶ 8.) Of that amount approximately \$250,000 was to be made available solely for the cost of the ComEd interconnect. (Ex. A, ¶ 12, fn. 2.) That motion was granted on December 18, 2001.

At all times, ComEd was fully aware of the subject matter of the motion and generally of RTC's plan to expand the Pontiac facility and to increase the capacity of that facility. ComEd was made aware of these matters through a variety of sources, including representatives from RTC. At no time did either ComEd or the Commission object to RTC's plans. Rather, they encouraged those plans.

Had either entity voiced an objection, RTC would not have proceeded with its plans and certainly would not have expended millions of dollars in increasing its capacity to generate more electricity. As noted previously, public policy encourages the development and generation of electricity from landfills and specifically requires ComEd to enter into long term contracts for the purchase of QSWEF generated electricity, an acknowledgement of the significant start up costs necessary to secure QSWEF compliance. If RTC knew that ComEd and the Commission would later contest the very increased energy output that they encouraged, RTC would never have incurred these costs.

ComEd's recent conduct only underscores why it should now be estopped from contending that it need not pay Rider 3 rates for energy in excess of 10 MW. On April 8, 2002, ComEd signed a declaration, which was a requisite to RTC being able to obtain financing from Aquila Energy Capital Corporation in order to pursue its expansion plans. In that declaration, a copy of which is attached as Ex. B, ComEd declares that, to the best of its knowledge, "there is no . . . proceeding or investigation pending or threatened against [ComEd] which . . . if adversely

determined . . . could adversely affect in any material respect performance by [ComEd] of its obligations” under its contract with RTC. (Ex. B, ¶ 7) (underscore supplied). While it is ComEd who actually initiated the instant declaratory proceeding, an adverse ruling could certainly affect in a material way its performance, in that it will be obligated to pay Rider 3 rates for all of the electricity purchased from the Pontiac facility. Any concern that ComEd had regarding its obligation to pay those rates, and resulting impact on the company if it was so obligated, should have been provided for in the declaration. RTC, which needed ComEd to sign the declaration in order to close the financing transaction, relied on ComEd’s lack of disclosure of precisely the issue that is now before the Commission. ComEd’s conduct in remaining silent of this issue in April 2002, but then filing an “Emergency” Petition to initiate this proceeding in July 2002 is further evidence of why it must now be estopped from pursuing the relief that it seeks.

Further, it is instructive to note that ComEd is not seeking a declaration that it does not have to purchase electricity in excess of 10 MW from the Pontiac facility. Rather, it simply wants to purchase that excess amount at cheaper rates. In other words, having encouraged RTC to expend millions of dollars, ComEd wants to cut a deal by which it can purchase the electricity at a lower cost, to the detriment of RTC. That is certainly contrary to the public policy initiative articulated by the Public Utilities Act.

ComEd and the Commission should not now be able to change their position, having induced RTC’s reliance to its detriment and must be required to pay Rider 3 rates for all of the energy purchased from the Pontiac facility.⁵

⁵ In addition to those rates being called required by ComEd’s contract with RTC, they are deemed by the Public Utilities Act to be “costs prudently incurred.” 220 ILCS 5/8-403.1(h) (“All amounts paid for power which a utility is required to purchase pursuant to subparagraph (c) shall be deemed to be costs prudently incurred for purposes of computing charges under rates authorized by Section 9-220 of this Act.”) Therefore, ComEd has not been damaged in any respect.

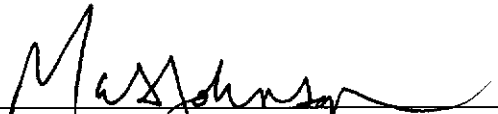
Substitute Language

Both ComEd and the Commission were well aware that RTC intended to further expand its energy generating capabilities at the Pontiac facility. Neither ComEd nor the Commission voiced any objection to those plans. Subsequently, in reliance on that conduct, RTC expended millions of dollars to increase the amount of electricity from landfill methane gas generated at the Pontiac facility. ComEd and the Commission had ample opportunity to raise any objection or to advise RTC of their belief that ComEd would not be required to purchase electricity in excess of 10 MW at the Rider 3 rates. Such conduct estops ComEd and the Commission from raising those objections now. Accordingly, ComEd is obligated to pay Rider 3 rates for all of the energy it purchases from RTC's Pontiac facility.

Respectfully submitted,

D'ANCONA & PFLAUM LLC

By:


One of the attorneys for petitioners Banco
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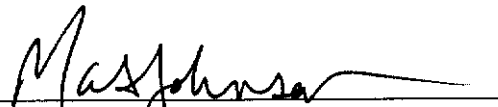
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NOTICE OF FILING

PLEASE TAKE NOTICE that we have this 5th day of August, 2002, filed with the Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, via Federal Express the **Brief On Exceptions By Banco Panamericano, Inc., Chiplease, Inc. and Leon Greenblatt** in the above-captioned proceeding.

PROOF OF SERVICE

Mark L. Johnson, being first duly sworn, deposes and says that he is an attorney for Banco Panamericano, Inc., Chiplease, Inc. and Leon Greenblatt and that on August 5, 2002 a copy of the **Brief On Exceptions By Banco Panamericano, Inc., Chiplease, Inc. and Leon Greenblatt** was served via Federal Express on Donna Caton, Chief Clerk of Illinois Commerce Commission and via facsimile to all parties of record on the attached Service List.


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